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No. 06-1569

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In The

Supreme Court of the United States

MARYLAND RECLAMATION, INC.,

Petitioner,

v.

RAMBLEWOOD HOMEOWNERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

BRIEF IN OPPOSITION FOR RESPONDENT DISTRICT COUNCIL

STEPHANIE PRATT ANDERSON
County Attorney
OFFICE OF LAW
County Administration Building
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
301.952.5225

**Counsel of Record*

STEVEN M. GILBERT*
Principal Counsel
OFFICE OF COUNTY COUNCIL
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
301.952.5261

Counsel for Respondent County Council of Prince George's County, Maryland, sitting as the District Council

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OR CALL COLLECT (402) 342-2831

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

Respondent County Council of Prince George's County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Prince George's County, respectfully states as follows, in response to the statement of "Questions Presented" by petitioner Maryland Reclamation, Inc.

1. Petitioner, in an effort to transform an ordinary zoning case into a controversy of constitutional dimension, has substantially misstated the issues presented to this Court and the course of state-court proceedings below. Neither question stated in the petition, under the Commerce Clause and the Fourteenth Amendment, was sufficiently raised by petitioner, in the Maryland courts; neither question was considered or passed on, in the Maryland courts; and neither question was factually developed by a record of evidence, in the Maryland courts.

2. If the Court were to grant this petition, it would search the record in vain, for any reference by a Maryland court to the Commerce Clause or the Fourteenth Amendment. The state court decisions,[1] including that of the trial court, Pet.App., at 23a; the Court of Special Appeals, *id.*, at 3a, which rendered the final opinion; and the Court of Appeals of Maryland, *id.*, at 1a, 2a, which denied certiorari and then denied reconsideration, show that no court even discussed the Commerce Clause or the Fourteenth Amendment.

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[1] Petitioner has included the Maryland court decisions in the appendix to its petition. Respondent Council will cite to items in petitioner's appendix as "Pet.App., at ___."

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED" – Continued

3. The opinion of the Court of Special Appeals demonstrates clearly that this case was decided on the theory of "cumulative adverse effects," under Maryland zoning law. Pet.App., at 13a-14a, 21a. In affirming the District Council decision denying the Maryland Reclamation special exception application, the lower court relied solely on Maryland zoning decisions. It did not review (and was not presented) questions of federal law.

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BRIEF IN OPPOSITION FOR RESPONDENT DISTRICT COUNCIL

Respondent District Council respectfully requests that this Court deny Maryland Reclamation's petition for writ of certiorari.

SUMMARY OF REASONS TO DENY THE PETITION

The Maryland court's decision is not eligible for review here, even if this Court found an issue of interest in the petition. As to the Commerce Clause, the lower court's decision rests on an adequate, independent state law ground, the cumulative adverse effects theory in Maryland zoning law. As to jurisdiction, no Maryland court considered the Commerce Clause and Fourteenth Amendment issues that petitioner raises here. Finally, the questions petitioners present do not have a factual record to support them.

STATEMENT OF THE CASE

Respondent District Council submits the following, to supplement and correct petitioner's statement of the case:

1. Petitioner suggests that this Court will review the "judgment" of 15 December 2006 of the Court of Appeals of Maryland. Petition, at 1. But the Court of Appeals merely denied, in its discretion, a petition for certiorari, under Md. Cts. & Jud. Proc. Code Ann. § 12-203 (2006 Repl. Vol.). Pet.App., at 1a. This Court's writ would run to the Court of Special Appeals, whose decision, under 28 U.S.C.

§ 1257(a), was the final one on the merits. Pet.App., at 3a. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 & n.1 (1968).

2. Petitioner substantially misstates the record, when it says that it "asked the [trial] court to determine whether or not the requirement of § 27-406(h) of the Prince George's County Zoning Ordinance violated the interstate commerce clause of the United States Constitution." Petition, at 1. Petitioner never made such a request, and neither the trial court nor the Maryland appellate court addressed the Commerce Clause. Pet.App., at 23a-26a, 3a-22a.

3. Petitioner also misstates the record when it suggests that it asked the trial court to determine "whether . . . the District Council . . . violated the petitioner's due process rights." Petition, at 1-2. At best, petitioner did so in passing; neither the trial court nor the Maryland appellate court addressed a due process issue under the Fourteenth Amendment. Pet.App., at 23a-26a, 3a-22a.

4. Respondent County Council, sitting as the District Council, acted here under the Regional District Act, § 8-101, et seq., Art. 28, Md. Code Ann. (2003 Repl. Vol.), not Articles 23A and 23B. Petitioner's citation is erroneous. Petition, at 4.

5. The illegal remand argument in the petition was not presented to any Maryland court. Petition, at 4-5. No court addressed the argument.

In addition, the materials that petitioner cites for its Commerce Clause argument, and the argument itself, were not presented to or reviewed by any Maryland court.

Petition, at 7-9. Nor were the "original jurisdiction" and "de novo" review theories. Petition, at 11-16. The latter arguments, purportedly raising due process issues, are presented in this Court for the first time.

REASONS FOR DENYING THE PETITION

I. THE MARYLAND COURT'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

This is a Maryland zoning case. The issues litigated in administrative proceedings, in the trial court, and in the appellate court were the "adverse effects" of the proposed land use, a rubble fill, and the "necessity" for the rubble fill at this location. Pet.App., at 6a-8a, 9a-10a, 11a. *Not* litigated below, at any level, were the two issues petitioner seeks review of here, Commerce Clause violation and Fourteenth Amendment Due Process Clause compliance.

The decision of the Court of Special Appeals was summarized as follows, in its opinion:

> We agree ... that on this administrative record, the adverse impact question was fairly debatable. Even the evidence and arguments offered by Maryland Reclamation supported the District Council's conclusion that adverse effects from the proposed rubble fill would be greater, in kind, degree, and/or duration, than those same adverse effects would be if the rubble fill were to be located elsewhere in the R-R zone.... [T]here is substantial evidence that the traffic, noise, dust, odor, and unsightliness associated with the proposed waste operation will be greater for the residents ..., because these citizens currently

> live with similar burdens created by the Brown Station landfill, the Ritchie rubble fill, and the electric substation, and have been doing so for decades. Both the confluent nature and the chronological duration of these adverse effects justify the District Council's decision not to extend them.

Pet.App., at 21a (portions omitted). This case was about traffic, noise, dust, odor, and unsightliness: these are "adverse effects" in Maryland zoning law. At no time before the filing of the petition did this case concern the Constitution.

The Maryland appellate court specifically did not rule on the necessity issue under § 27-406(h) of the zoning ordinance, the section that petitioner attacks here, under the Commerce Clause. It did not have to. The court held that even if necessity had been proved, petitioner's evidence on adverse effects was insufficient. Pet.App., at 11a.

In these circumstances, the decision of the Maryland court plainly rests on an adequate and independent state law ground. That is, petitioner had its application denied because of adverse effects, under § 27-317 of the zoning ordinance; the necessity argument under § 27-406(h) was not considered; and the Commerce Clause issue, even if properly raised, would also not have been considered.

As to the Commerce Clause, this Court has no jurisdiction. The Court will not take up a question of federal law "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

II. NO MARYLAND COURT ADDRESSED THE COMMERCE CLAUSE OR THE FOURTEENTH AMENDMENT.

The decisions on the merits in both the trial court, Pet.App., at 23a, and the appellate court, *id.*, at 3a, and the discretionary denial of review in the Court of Appeals, *id.*, at 1a, 2a, did not mention the Commerce Clause or the Fourteenth Amendment. Moreover, petitioner has overlooked the requirement in Rule 14.1(g)(i) of the Supreme Court Rules that petitioner's statement of the case must indicate "when the federal questions sought to be reviewed were raised . . . and the way in which they were passed on by those courts."

If petitioner fully complied with Rule 14.1(g)(i), it would have to acknowledge that it never briefed or argued either the Commerce Clause or the Fourteenth Amendment; that it specifically introduced no evidence on either issue; and that no Maryland court considered either issue. Petitioner does not satisfy the rule, and cannot demonstrate to the Court "that the federal question was timely and properly raised" or that the Court "has jurisdiction to review the judgment." The federal questions petitioner presents here were simply not litigated below.

Under the Commerce Clause, petitioner claims that § 27-406(h) of the Prince George's County zoning ordinance is unconstitutional. Petition, at 7-11. The Maryland courts did not see petitioner's citations or read its argument.

Under the Fourteenth Amendment, petitioner concocts an elaborate theory that it was denied a "fair hearing." Petition, at 11-16. The argument, based on misinterpretations of the zoning ordinance and substantial misstatements

of what transpired below, was not offered in any form in the Maryland courts. The zoning ordinance does not, for evidentiary purposes, grant "original jurisdiction" to the District Council, in zoning cases; the District Council *never* conducts "de novo" evidentiary hearings, in zoning cases; and petitioner never made those arguments, in proceedings below. If it had, the trial court and the appellate court would have mentioned them.

Petitioner must show that the federal questions were presented to or addressed by the Maryland courts. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Under 28 U.S.C. § 1257(a), the Court has no jurisdiction over the Commerce Clause or Fourteenth Amendment claims. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 & n.2 (1972) (constitutional issues must be raised "in clean-cut and concrete form," quoting *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947)).

III. THE RECORD HAS INSUFFICIENT EVIDENCE TO CONSIDER THE COMMERCE CLAUSE OR FOURTEENTH AMENDMENT ISSUES.

Finally, if the Court were inclined to grant the writ and call up the state-court record, it would find scant support for either theory petitioner advances.

On the Commerce Clause, the petition already presents to the Court all the evidence the record contains. Petition, at 7-11. Petitioner offered nothing, at any level of state administrative or judicial proceedings.

As to Fourteenth Amendment due process, petitioner did not raise the argument before the District Council or the trial court, and certainly presented no evidence.

Petition, at 11-16. This argument is simply makeweight, to fortify the constitutional standing of the petition.

The record is insufficient for the Court's review. *Cf. Michigan v. Harvey*, 494 U.S. 344, 354 (1990) (no record, where constitutional issue "was never litigated").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHANIE PRATT ANDERSON
County Attorney
OFFICE OF LAW
County Administration Building
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
301.952.5225

STEVEN M. GILBERT*
Principal Counsel
OFFICE OF COUNTY COUNCIL
County Administration Building
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
301.952.5261

Counsel for Respondent County Council of Prince George's County, Maryland, sitting as the District Council

**Counsel of Record*

June 28, 2007